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No. 88-1832

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JAMES PAUL DOHERTY,
Petitioner,

vs.

SOUTHERN COLLEGE OF OPTOMETRY,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the trial court and the court of appeals erred in denying petitioner's claim under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, despite the trial court's specific findings that petitioner was treated differently from his nonhandicapped classmates at the respondent Southern College of Optometry in determining the requirements for graduation and that this disparate treatment occurred "because of his handicap."

II. Whether the trial court and the court of appeals erred in denying petitioner's claim under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, despite the refusal of the respondent Southern College of Optometry to reasonably accomodate petitioner's handicap by waiving certain mechanical proficiency requirements.

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The petitioner James Paul Doherty respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this case on December 1, 1988.

REFERENCES TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 862 F.2d 570 (6th Cir. 1988), and appears in the Appendix to this Petition at page A-1. The opinion of the United States District Court for the Western District of Tennessee is reported at 659 F. Supp. 662 (W.D. Tenn. 1987), and appears in the Appendix at page A-19.

STATEMENT OF JURISDICTIONAL GROUNDS

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on December 1, 1988. A timely petition for rehearing or rehearing en banc was denied on February 3, 1989. This Petition for Writ of Certiorari was filed within ninety days of that date. This Court's jurisdiction in invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED IN THIS CASE

Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794:

Nondiscrimination under federal grants and programs; promulgation of rules and regulations

(a) Promulgation of rules and regulations.

No otherwise qualified individual with handicaps in the United States as defined in section 706(8) of this title, shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . .

STATEMENT OF THE CASE

A. Procedural History

Petitioner James Paul Doherty asserted a claim against respondent Southern College of Optometry ("SCO") under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. Additionally, petitioner asserted a claim under 42 U.S.C. § 1983 and pendent state law claims of breach of contract, misrepresen-

tation, outrageous conduct, and tortious interference with contract.[1]

On April 28, 1987, the district court issued its opinion holding in favor of SCO on petitioner's Section 504 claim. *Doherty v. Southern College of Optometry,* 659 F. Supp. 662 (W.D. Tenn. 1987) (reproduced in Appendix at A-19). The court of appeals affirmed that decision. *Doherty v. Southern College of Optometry,* 862 F.2d 570 (6th Cir. 1988), *reh'g and reh'g en banc denied* (6th Cir. 1989) (reproduced in Appendix at A-1).

B. Petitioner's Handicap

Petitioner suffers from retinitis pigmentosa, also known as "RP," and an associated neurological condition. (Petitioner at Tr. 167). RP is an eye disease that results in the loss of peripheral vision (*i.e.*, tunnel vision) and also causes a loss of sight in reduced light (*i.e.*, night blindness).

An evaluation of petitioner by The Clinical Center of the National Institute of Health described the neurological condition associated with petitioner's RP as a "neurologic disease manifest [sic] by peripheral sensory neuropathy, minimal motor abnormalities and cerebellar signs." (Petitioner at Tr. 184-86; Trial Ex. 3). This neurological condition affects petitioner's

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[1] The claims under 42 U.S.C. § 1983 and the claim of tortious interference with contract were dismissed prior to trial. (R. 27, Order Granting Partial Summary Judgment; R. 39, Order Granting Plaintiff's Motion to Dismiss Claims of Inducement to Breach Contract). In a single trial, the remaining state law claims were tried before a jury, and the Section 504 handicap discrimination claim was tried to the court. The trial court directed a verdict in favor of defendant on plaintiff's outrageous conduct and misrepresentation claims. The jury thereafter returned a verdict of $225,000 in favor of plaintiff on the remaining state law breach of contract claim. (R. 51, Jury Verdict). This verdict was reversed by the court of appeals based on the status of Tennessee law. No review is sought in this petition of any issue related to the 42 U.S.C. § 1983 claim or to the state law claims.

motor skills as well as his sense of touch and his manual coordination. (Petitioner at Tr. 167-69, 290).[2]

C. Jurisdiction Under Section 504

Defendant Southern College of Optometry ("SCO") is a private not-for-profit corporation with its principal place of business in Memphis, Tennessee. SCO offers a four-year optometry program which leads to a Doctorate of Optometry ("O.D.").

Between 1977 and 1982, SCO was the recipient of substantial federal grants for college work study programs, for the administration of federal student loan programs and for capital improvements. (Porter at Tr. 570-76; Trial Ex. 100-105). Certain portions of these funds were allocated for and used in the clinical program at SCO — the specific program that is the focus of this action. (*Id.*). At trial, SCO admitted that it is subject to the requirements of Section 504. (Porter at Tr. 574).

D. Petitioner's Application and Matriculation at SCO

Prior to his admission to SCO, on January 5, 1977, petitioner was examined by Drs. Ebbers, Vasa, and Smith at SCO's clinic. (Petitioner at Tr. 187-88; Dale at Tr. 476-77; Ebbers at Tr. 762-63, 771; Smith at Tr. 809). This examination was conducted at the request of Phyllis Dale, a counselor with the Rehabilitation for the Blind Division of the Tennessee Department of Human Services, and was performed for the express

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[2] The court of appeals commented on a physical examination of petitioner performed by a Dr. Gotten prior to petitioner's enrollment at SCO. These comments were apparently intended to show that SCO was not adequately informed about plaintiff's neuromuscular condition. (Appendix at A-2). However, notice concerning petitioner's handicap is not determinative of petitioner's Section 504 claim. Moreover, the court of appeals ignored undisputed evidence that SCO received and reviewed the NIH report. (Petitioner at Tr. 184-86, 302; Trial Ex. 3).

purpose of ascertaining whether petitioner was physically able to perform the requirements of the O.D. program and identifying what, if any, employment opportunities would be available to petitioner after graduation. (Dale at Tr. 474-76, 480-82). Petitioner's medical and health records for the prior ten years were made available to the clinic personnel at SCO. (Dale at Tr. 481; Trial Ex. 24).

Initially, the doctors at SCO were pessimistic about petitioner's ability to succeed in optometry. After investigation, however, Drs. Ebbers and Vasa both told Ms. Dale that petitioner's condition appeared stable, that the possibilities for petitioner in optometry were promising, and that petitioner should be able to practice optometry without restriction. (Dale at Tr. 488; Trial Ex. 25). Drs. Ebbers and Vasa advised Ms. Dale that even if petitioner's condition should deteriorate, he would still have employment opportunities in teaching, supervising others in training, or in operating an optometric business. (*Id.*).

Petitioner entered SCO in the fall of 1978, and successfully completed more than three years of the four-year O.D. program. (Petitioner at Tr. 218, 220; Trial Ex. 17). At the end of the 1981 summer quarter, which was the beginning of his final year at SCO, petitioner was a senior in good standing, with a grade point of 2.41 of a possible 4.00. (R. 35, Joint Pretrial Order (stipulations of fact)). He had completed the same course of study as others in his class at that time and had done so without any special accomodations by SCO. (*Id.*).

E. Petitioner's Pathology Clinic Check-Out

During petitioner's first year at SCO, the school changed its graduation requirements retroactively to make mandatory for all students its existing externship program — an outside work-study program. Also, SCO added clinical proficiency requirements which had to be satisfied prior to entering the mandatory externship program. (*Compare* Trial Ex. 4, 1978-79 SCO catalog, *with* Trial Ex. 42, 1981-82 SCO catalog). In par-

ticular, SCO added a "check-out" requirement for the pathology clinic.

In May 1981, Dr. Denson Smith, the Chief of the Pathology Clinic at SCO, was advised that petitioner was experiencing difficulty using certain instruments in the pathology clinic. Dr. Smith testified that he was of the opinion that petitioner did not have the necessary "eyesight" or the "coordination and sensitivity in his fingers" to perform with the instruments in the pathology clinic. (Smith at Tr. 816). Dr. Smith thereafter prohibited petitioner from touching patients in the pathology clinic and restricted petitioner's activities to taking case histories and evaluating data. (Smith at Tr. 816; Petitioner at Tr. 229-30). Petitioner was, however, permitted to continue working with patients in SCO's other specialty clinics, including the contact lens clinic. (Petitioner at Tr. 240-41).

On September 11, 1981, Dr. John Levene, then Dean of Faculty at SCO, wrote SCO President Spurgeon B. Eure, stating: "In view of his tremendous handicaps, [petitioner] is to be commended for the tremendous effort that he has put out and what he has achieved so far academically. . . . He obviously must realize that he can never practice optometry as a 'normal' clinical practitioner." (Trial Ex. 27). On November 3, 1981, Dr. Levene wrote to the Assistant Director of Clinical Programs, Dr. Tirey, stating that he believed there was "nothing to be gained by prolonging it" and that petitioner's competency exam should be scheduled "at the earliest opportunity." (Trial Ex. 29).

On November 4, 1981, Dr. Tirey sent petitioner a memorandum advising plaintiff to contact him as soon as possible to set up his competency exam. On November 18, 1981, petitioner was given his pathology check-out by Dr. Smith and his assistant, Dr. Linda Bass. (Tr. 817-18). This was scheduled to be a check-out on *all* of the required pathology procedures. (Petitioner at Tr. 238-39).

During the pathology check-out, petitioner successfully performed with two instruments. (Smith at Tr. 818-19). When petitioner then attempted to perform with the Zeis 4-mirror gonioscope, he "raked" the instrument across the patient's eye and was unable to perform with the instrument. (*Id.*). Smith then terminated the check-out exam. (*Id.*). Dr. Smith testified that the use of two further instruments — the Goldman 3-mirror gonioscope and the Binocular Indirect Opthalmoscope — was even more difficult and that he saw no reason to permit petitioner to even attempt to check out on these instruments. (Smith at Tr. 820).

Dr. Smith detailed the results of petitioner's check-out exam in a memo dated November 18, 1981. He stated:

> My opinion today is the same as it was stated in my memo of July 2, 1981. He does not possess the *fine muscle coordination* and *eyesight* necessary to do the techniques successfully and with a reasonable amount of safety to a patient.

(Tr. 237-38; Trial Ex. 12) (emphasis added).

Although he failed to pass the pathology check-out, petitioner successfully passed *all* of the other clinical check-outs required for participation in the mandatory externship program, including vision training, electrodiagnostics, dispensing, contact lens, and general clinic. Petitioner only lacked demonstration of mechanical proficiency on four instruments in pathology clinic and his externship to complete the requirements for graduation. (Petitioner at Tr. 232-33, 242; Trial Ex. 17). These four instruments were the Zeis 4-mirror gonioscope, the Goldman 3-mirror gonioscope, the Binocular Indirect Ophthalmoscope, and the Schiotz tonometer.

Petitioner requested a waiver of the mechanical proficiency check-out requirements on these four instruments. This request was considered and denied by the SCO Admissions and Ex-

aminations Committee and by SCO's Board of Trustees. (Petitioner at Tr. 242-43). The Board of Trustees did direct, however, that petitioner be given an additional quarter to practice with the pathology instruments in question and that he then be re-examined. (Trial Ex. 15). This offer was made even though the SCO faculty clearly did not believe that petitioner was physically capable of passing the pathology check-out after his failure in November 1981.[3]

On June 3, 1982, SCO President Eure wrote to petitioner advising him that he had failed his second pathology check-out. Specifically, Eure stated: "Since you will be unable to complete your degree requirements, you must be advised that your enrollment in the Doctor of Optometry Program is terminated." (Trial Ex. 19).

F. The Instruments

The four instruments with which petitioner was unable to demonstrate mechanical proficiency are used to evaluate the pathology of the human eye. Each routinely requires the use of diagnostic drugs. The importance of mechanical proficiency

Petitioner practiced the various pathology procedures on volunteer patients during the 1982 spring quarter. (Petitioner at Tr. 249, 253-54). On June 2, 1982, petitioner was given a second pathology check-out exam. This exam was conducted by three SCO professors: Dr. James H. Burke, Dr. Fred R. Burnett and Dr. Jim M. Newman, III. (Petitioner at Tr. 334). Dr. Levene, the Dean of Faculty, was also present. (*Id.*). Petitioner again failed the check-out exam.

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[3] On December 1, 1981, Dr. Levene wrote to President Eure: "I see no hope that St[udent] Dr. Doherty may pass the clinic competency test in the future." (Trial Ex. 36, p. 2). Dr. Levene stated in a follow-up memo to President Eure: "As far as pathology is concerned, there seems to be, according to the Chief of Pathology, Dr. Smith, '*no point in re-testing.*' " (Trial Ex. 37) (emphasis added).

with these four instruments to an optometry degree was a point of contention throughout the trial.

Dr. John Mohr, a 1961 graduate of SCO, testified that he has been involved in the general practice of optometry in Mississippi for more than twenty-three years. (Mohr at Tr. 434-35). He stated that he does not use any of these four instruments. (Mohr at Tr. 437-38). Dr. Mohr, a former officer of the Mississippi Optometric Association, further testified that these instruments are seldom used by optometrists in general practice in Mississippi. (Mohr at Tr. 441-42). He concluded his testimony by stating that an optometrist can practice optometry at acceptable medical standards without the use of any of these four instruments. (Mohr at Tr. 445).

Dr. Raymond John Homer, a former SCO professor and one of petitioner's former instructors in the general clinic at SCO, testified that these four instruments were not routinely used in the examination of members of the public who presented themselves to the general clinic at SCO. (R. 44, Deposition of Raymond John Homer at 12). This fact was confirmed by two current professors at SCO. (Ebbers at Tr. 760-61; Smith at Tr. 830-31). Dr. Homer further testified that, since leaving SCO, he had practiced optometry in Texas, that he had not used these instruments in his practice in Texas, and that the law of Texas did not permit optometrists to use diagnostic drugs and, therefore, that the use of these instruments by a practicing optometrist was illegal. Dr. Homer further testified that these instruments were used primarily by "ophthalmologists or some type of eye or retinal specialist, other than a general practicing optometrist." (R. 44, Deposition of Homer at 15).

There was additional proof from other doctors that the instruments in question are only used with patients who require additional evaluation of potential pathology problems. (Thomas at Tr. 348-49). The other doctors who testified at trial, including SCO faculty members, agreed that an optometrist

could successfully practice without the use of these instruments. (Stander at Tr. 384; Ebbers at Tr. 769-70; Smith at Tr. 830).

SCO rebutted this testimony with conclusory expert testimony that these instruments are "a necessary part of an optometric examination." (Alexander at Tr. 1135). However, the "necessity" of mechanical proficiency with the instruments is best measured by the disparate manner in which SCO tested handicapped and nonhandicapped students.

G. The Undisputed Evidence of Disparate Treatment

Drs. Steve Thomas and Thomas Stander, nonhandicapped classmates of petitioner, testified that students could choose the instructor whom they desired to check them out and that students could check out on one instrument at a time or all at once. (Petitioner at Tr. 233-34; Thomas at Tr. 346; Stander at Tr. 382-83). Dr. Thomas stated that the student would only be checked out by *one* doctor. (Thomas at Tr. 346).

Dr. James Burke, a clinic instructor at SCO, testified that students normally checked out at their own rate prior to externships, but that most students would check-out on a "block" of instruments at one time. (Burke at Tr. 1086-87). Dr. Burke also testified that students got a second chance to retest on any instruments that they failed in the pathology check-out. (*Id.*). Both petitioner and Dr. Thomas testified that students retested numerous times. (Petitioner at Tr. 233-34; Thomas at Tr. 359).

As previously noted, petitioner was prohibited from performing procedures in SCO's pathology clinic involving physical contact with patients after July 1981. In November 1981, he was given less than two weeks notice of the scheduling of his pathology check-out. He was then tested by Dr. Smith and an assistant, not by an instructor of his choice, and he was scheduled to be tested on all of the pathology instruments at one time.

Dr. Levene, who directed that petitioner be given his competency exam in November, testified:

Q. Had you ever ordered that a competency examination be performed at a scheduled date at your choice on a student?

A. No, no, but this was an *exception,* you know.

. . .

Q. Have you ever given a week's notice to a student before, to take their compentency tests?

A. No, we don't usually give them any notice. They take it when they can.

Q. By 'can' you mean when they choose to take it?

A. Yes.

(R. 49, Deposition of John Ruben Levene at 99, 101) (emphasis added).

The experiences of Drs. Thomas and Stander in the pathology clinic check-out significantly differed from petitioner's experience. In fact, Dr. Thomas testified that he was *not required* to perform all of the procedures: He was never tested on either the Schiotz tonometer or the Goldman 3-mirror gonioscope. (Thomas at Tr. 345-46). Moreover, when he performed with the Binocular Indirect Ophthalmoscope, Dr. Burke passed him on the technique, stating that Burke was not sure "whether I was seeing what I should be seeing or not and that I should practice, but that he would pass me on the technique." (Thomas at Tr. 346). Dr. Stander likewise was never checked out on the Schiotz tonometer; instead, Dr. Smith simply asked him certain questions about the Schiotz tonometer. (Stander at Tr. 382). Furthermore, Dr. Stander was merely checked out by another student, not a professor, on the Zeis 4-mirror gonioscope. (Stander at Tr. 381). Petitioner also testified that some students were passed on instruments that were out-of-order at the time of the checkout. (Petitioner at Tr. 282). None of this testimony was refuted by SCO.

In sum, petitioner's nonhandicapped classmates were often not tested or tested in a very relaxed manner on the instruments in question. Petitioner, on the other hand, was given a comprehensive exam on *all* instruments by two professors. After his failure in November 1981, petitioner was not immediately offered the opportunity for retesting normally available to other students. He did not receive such an offer until after his appeal for waiver was heard by the Board of Trustees. Thereafter, he was retested by three professors.

H. Petitioner's Qualifications

Despite his failure of the pathology check-out, the proof at trial was that petitioner was otherwise capable of practicing optometry and, more importantly, qualified to receive the O.D. degree. Dr. Homer, who tested petitioner in the general clinic of SCO, testified:

> Q. Based on your knowledge of J.D. and your experience in as an optometrist and teaching optometry, do you think J.D. could practice optometry without being able to mechanically use the four instruments that we have talked about?
>
> A. Yes.
>
> Q. Describe how he could practice optometry; some examples.
>
> A. In any way he desired. He is not limited to a practice. Most of the — the four pieces of equipment that you are discussing are seldom used by the practitioners that I know, that I associate with, and depending on the state, he can run any type of practice he wants. He can limit it to contact lenses, he can use assistance, technicians, as many as he wants.
>
> I know practitioners, successful practitioners, who base their success on their technicians and their

assistants performing the majority of the tests, and they are more or less in a supervisory capacity of overlooking the material, the same thing that I did in general clinic. I would be presented with all the data and I would check it over to make sure that it was correlated and that that was my choice of therapy.

I used technicians primarily in my practice, and I do primarily an internal-external examination, which I feel every optometrist would be required to do, along with the general refraction, in other words using the phoropter or any type of refracting device that he sees fit, but as far as his understanding of patient handling, I see no reason why he couldn't practice optometry.

(R. 44, Deposition of Homer at 18-19).

Likewise, Dr. L. Allen Fors, another professor at SCO, wrote on petitioner's behalf:

To me *it seems that Mr. Doherty exhibits the skills to be a successful optometrist*. He has some known visual limitations that he is highly aware of. Because of this awareness, I feel Mr. Doherty will be especially careful and refer any patients he feels he cannot adequately care for. Indeed, he may have an advantage over some of his classmates who are less skilled in certain areas but still haven't reconciled it because they are less noticeable.

(Trial Ex. 20) (emphasis added).

REASONS FOR GRANTING THE WRIT

A. This Case Presents an Important Issue Relating to The Determination of Whether a Claimant Under Section 504 Is "Otherwise Qualified".

Section 504 does not instruct recipients of federal funds on what methods to use to determine whether a handicapped individual is "otherwise qualified." In *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979), this Court held that "[a]n otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." The *Davis* opinion, however, provides little clarity as to what standards may be applied to measure qualifications.

In *Alexander v. Choate*, 469 U.S. 287, 301 (1985), this Court further interpreted *Davis* and the "otherwise qualified" requirement:

> The balance struck in *Davis* requires that an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers. The benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled. . . .

The court of appeals below, quoting *Brennan v. Stewart*, 834 F.2d 1248, 1261-62 (5th Cir. 1988), recognized that, after *Alexander v. Choate,* courts can no longer read literally the *Davis* requirement that a handicapped individual be able to meet *all* of a program's requirements in spite of his handicap.

In the present case, SCO admitted petitioner to its O.D. program and he sucessfully completed three years of a four-year program without any accomodation. During this time, SCO retroactively changed its graduation requirements to require demonstration of mechanical proficiency with the four instruments in question. SCO then became concerned that peti-

tioner might have some difficulty in meeting these physical requirements. To address this concern, SCO imposed upon petitioner a testing process more rigorous than that imposed upon his nonhandicapped classmates.

On this basis, the trial court concluded that "[petitioner] has established that he was treated differently from other students in the testing process because of his handicap." (Appendix at A-42 n.7). However, the trial court concluded that this disparate treatment was insignificant because petitioner had conceded that he could not pass the check-out examination. *Id.*

The district court's analysis and the court of appeal's affirmance beg the question. While it was admitted that petitioner could not pass the check-out exam given to him, it was equally undisputed that, had he been tested as were his nonhandicapped classmates (i.e., not tested on mechanical proficiency), he would have completed the requirements for participation in the externship program, completed the externship program, and graduated from SCO.

The fundamental issue presented by these facts is whether a recipient of federal funds can, on the basis of a difficulty encountered by a handicapped program beneficiary, impose a higher standard to measure the qualifications of the handicapped individual than is used to measure the qualifications of a nonhandicapped individual. Petitioner asserts that Section 504 does not permit such disparate treatment.

B. The Disparate Treatment of Petitioner Violated Section 504.

This Court has noted that the objective of Section 504 is "to assure *evenhanded treatment* and the opportunity for handicapped individuals to participate in and benefit from programs receiving federal assistance." *Alexander v. Choate*, 469 U.S. 287, 304 (1985) (emphasis added).

More specifically, Section 504 reflects "'Congress' concern with protecting the handicapped against discrimination stemming not only from simple prejudice, but from 'archaic attitudes and laws' and from 'the fact that the American people are simply unfamiliar with and insensitive to the difficulties confront[ing] individuals with handicaps.' " *School Board of Nassau County v. Arline*, 480 U.S. 273, 279 (1987) (quoting legislative history to Rehabilitation Act). The focus of Section 504 is, accordingly, on the comparative treatment of handicapped and nonhandicapped beneficiaries of federally funded programs. *See Bowen v. American Hospital Association*, 476 U.S. 610, 637 n.23 (1986).

In the present case, the trial court specifically determined that petitioner was treated in a disparate manner because of his handicap. (Appendix at A-42 n.7). This finding was clearly supported by the undisputed evidence that petitioner was singled out, due to his handicap, for a rigorous mechanical proficiency test on the four instruments in question. This testing process was in stark contrast to the experiences of petitioner's nonhandicapped classmates who were not tested on some or all of the instruments or tested only on their abstract knowledge of the operation of these instruments.

In nevertheless denying petitioner's Section 504 claim, the trial court made the same error that had been made by SCO: it applied a higher standard to determine petitioner's qualifications than was applied to nonhandicapped students and did so *because of his handicap*. The record is clear that, if petitioner had been tested in the same manner as his nonhandicapped classmates, *i.e.*, not on mechanical proficiency, he would have passed the pathology clinic. The court of appeals repeated the trial court's conclusion, without specifically addressing the undisputed evidence of disparate treatment.

The reasoning of the courts below defeats the very purpose of Section 504. According to the lower courts' analysis, a recipient

of federal funds can establish a higher standard for a handicapped person and then deny the handicapped person benefits when he fails to meet the higher standard, even where it is clear that the handicapped person has been able to meet the standards actually applied to nonhandicapped persons. Certainly, Congress did not intend such a result. Moreover, such disparate treatment defies this Court's proscription that federally funded benefits not be defined "in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled." *Alexander v. Choate*, 469 U.S. at 301.

C. Respondent SCO Failed to Reasonably Accommodate Petitioner's Handicap as Required by Section 504.

Section 504 imposes upon recipients the obligation to reasonably accommodate handicapped beneficiaries. The applicable United States Department of Education regulation interpreting Section 504 states that "reasonable accommodation" may include modification of academic requirements to accommodate the handicapped.

The pertinent regulation provides:

> A recipient to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. *Academic requirements that the recipient can demonstrate are essential to the program of instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section. Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.*

34 C.F.R. § 104.44(a) (1988) (emphasis added).

In *Alexander v. Choate,* this Court reaffirmed the reasonable accommodation requirement as it reviewed and interpreted its earlier decision in *Davis*. This Court noted that in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979),

> [w]e stated that, under some circumstances, a "refusal to modify an existing program might become unreasonable and discriminatory . . . ." We held that the college was not required to admit Davis [the plaintiff nursing applicant] because it appeared unlikely that she could benefit from any modifications that the relevant HEW regulations required, *id.*, at 409, and because the further modifications Davis sought — full-time, personal supervision whenever she attended patients and *elimination of all clinical courses* — would have compromised the essential nature of the college's nursing program, *id.* at 413-414. Such a "fundamental alteration in the nature of a program" was far more than the reasonable modifications the statute or regulations required. *Id.*, at 410. *Davis* thus struck a balance between the statutory rights of the handicapped to be integrated into society and the legitimate interests of federal grantees in preserving the integrity of their programs: *while a grantee need not be required to make "fundamental" or "substantial" modifications to accommodate the handicapped, it may be required to make "reasonable" ones.* . . .

469 U.S. at 300-01 (emphasis added; footnotes and citations omitted).

In the present case, petitioner sought a waiver of the "mechanical proficiency" requirements on these four instruments. SCO denied this waiver despite the undisputed fact that:

(1) Nonhandicapped students were not required to demonstrate mechanical proficiency with the instruments in question;

(2) Petitioner was otherwise clinically competent and had proven his competency in prior clinical experiences; and

(3) Petitioner possessed sufficient knowledge and understanding of the instruments in question and had successfully demonstrated his ability to use the data provided by such instruments.

Further, petitioner offered proof that:

(1) Optometrists do not routinely use these instruments in the general practice of optometry;

(2) These instruments are not used in the general eye exam at SCO;

(3) The use of these instruments by an optometrist was, in 1982, illegal in states that did not permit optometrists to use diagnostic drugs. *See, e.g.*, Ala. Code § 34-22-1 (1977) ("Nothing in this section shall be construed so as to permit the administering of drugs in any form . . . ."); Tex. Civ. Code § 4552-1.92 (1976) ("Nothing herein shall be construed to permit optometrists to treat the eyes for any defect whatsoever in any manner or to administer or prescribe any drug . . . ."); and

(4) Technicians rather than optometrists can be used to mechanically operate optometric instruments with the optometrist evaluating the results.

The evidence presented at trial was thus overwhelming that the demonstration of mechanical proficiency with the four instruments in question was neither *necessary* nor *essential* for

petitioner to receive the principal benefit of SCO's federally assisted O.D. program. Moreover, but most importantly, SCO itself did not use mechanical proficiency with these instruments as a standard for determining whether nonhandicapped students were qualified.

The result reached by the courts below renders meaningless the Section 504 accommodation requirement. By simply declaring a requirement to be "essential" or "necessary," an educational institution can insulate itself from the obligation to reasonably accommodate. Petitioner submits that a more fact-based inquiry is necessary under Section 504 and that the lower courts failed to appropriately scrutinize SCO's rationale.

CONCLUSION

For these reasons, a writ of certiorari should be granted to review the judgment of the United States Court of Appeals for the Sixth Circuit.

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APPENDIX

APPENDIX A

OPINION OF THE COURT OF APPEALS

Nos. 87-5595/5655

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

James Paul Doherty,
Plaintiff-Appellant/Cross-Appellee,

v.

Southern College of Optometry,
Defendant-Appellee/Cross-Appellant.

On Appeal from the United States District Court for the Western District of Tennessee.

Decided and Filed December 1, 1988

Before: KENNEDY and JONES, Circuit Judges; and CONTIE, Senior Circuit Judge.

KENNEDY, Circuit Judge, delivered the opinion of the court, in which CONTIE, Circuit Judge, joined. JONES, Circuit Judge, (pp. 18-19) delivered a separate opinion concurring in part and dissenting in part.

KENNEDY, Circuit Judge Plaintiff-appellant/cross-appellee James Doherty (plaintiff), a former student of the defendant Southern College of Optometry (SCO), appeals from the judgment of the District Court dismissing his claim under Section 504 of the Rehabilitation Act of 1973, and directing a verdict in

favor of SCO on his misrepresentation claim. *Doherty v. Southern College of Optometry*, 659 F. Supp. 662 (W.D. Tenn. 1987). SCO appeals from a jury verdict in favor of the plaintiff on his breach of contract claim, and alleges on appeal that the District Court erroneously instructed the jury with regard to that claim, and erred in denying SCO's motions for a mistrial and directed verdict. We affirm the dismissal of the section 504 and misrepresentation claims. We reverse the denial of a directed verdict for SCO on the breach of contract claim.

The plaintiff suffers from retinitis pigmentosa (RP) and an associated neurological condition. The RP restricts the plaintiff's visual field to a minimal field of six degrees in his right eye and ten degrees in his left eye. The neurological condition affects the plaintiff's motor skills as well as his sense of touch and his manual coordination.

The plaintiff applied for admission to SCO in 1975. Before being admitted the plaintiff was examined by SCO faculty members, Drs. Ebbers and Vasa, at the request of Ms. Phyllis Dale, a counselor for the Rehabilitation for the Blind Division of the Tennessee Department of Human Resources, at SCO's clinic. Dr. Ebbers reported that the plaintiff's RP had stabilized and that the plaintiff's "ability to overcome his field constriction by eye movements, combined with his academic record, and his motivation, all indicate that *visually* he should be able to handle any academic endeavor he attempts." (Emphasis added.) Both Drs. Ebbers and Vasa indicated that, although initially they had been pessimistic about the plaintiff's opportunities in optometry, after examining him they felt his possibilities were promising. The plaintiff was also examined by an independent internist, Dr. Gotten, who evaluated the plaintiff's neurological disorder and reported that "I think that it would be most difficult for [the plaintiff] to be an optometrist, but I certainly would not discourage him trying." Although Dr. Gotten sent the report to Ms. Dale, neither SCO nor Dr. Ebbers received this report.

In his application to SCO, the plaintiff listed "Retinitis Pigmentosa" in response to the question as to handicaps, but did not mention that he suffered from neurological problems. The plaintiff's physician's report, completed as part of the application, stated that the plaintiff did not suffer neuromuscular abnormalities. The plaintiff also failed to inform SCO of his neurological difficulties when he completed a student health record. SCO admitted the plaintiff to its four-year optometry program. He entered under the 1978-79 SCO catalog, which provided on the inside front cover that "[t]his edition of the Southern College of Optometry catalog is effective for the academic year 1978-79. Inasmuch as changes may be necessary from time to time, this catalog should not be construed as constituting a contract between the College and any person." Under SCO policy, each school year is governed by the current school year catalog. SCO does not retroactively apply additional requirements for students who have already completed the year to which the additional requirements pertain. That is, SCO does not require a fourth year student to take a first or second year course that was added by the current catalog. SCO does, however, require first and second year students to take a new course that affects the third or fourth year course requirements.

During the plaintiff's first year at SCO, the school began to require that students pass a pathology clinic proficiency requirement in order to qualify for an externship program required for fourth year students. According to the school policy, the plaintiff was subject to the new requirement. The pathology clinical proficiency examination requires the student to perform techniques with various instruments. The plaintiff stipulated at trial that he could not perform the techniques on four of the required instruments: The Zeiss 4 mirror gonioscope, the Goldman 3 mirror gonioscope, the Binocular Indirect Ophthalmoscope and the Schiotz Tonometer. After the plaintiff failed his "check-out" on these instruments, he appealed the decision to the Admissions Committee, requesting that these requirements be

waived. The Committee rejected the appeal. The Board of Trustees also denied his appeal, but granted the plaintiff an additional quarter to practice the techniques. In spite of the extra practice, the plaintiff again failed to demonstrate his proficiency with these instruments.

When SCO refused to confer a degree upon the plaintiff, he filed suit in the United States District Court for the Western District of Tennessee against SCO and two faculty members alleging both a violation of section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982), and section 1983. 42 U.S.C. § 1983 (1982). Plaintiff also asserted pendent state law claims of breach of contract, misrepresentation, outrageous conduct, and tortious interference with contract. The District Court dismissed the section 1983 claim and the tortious interference with contract claim before trial. The remaining state law claims were tried before a jury; the District Court, however, directed a verdict in favor of all the defendants on the outrageous conduct and misrepresentation claims. The jury returned a verdict of $225,000 in favor of the plaintiff on the breach of contract claim. The District Court denied SCO's motion for a mistrial based on jury misconduct. The section 504 claim was tried by the District Court, which found in favor of SCO. The plaintiff appeals from the District Court's decision on the section 504 claim and from the directed verdict in favor of SCO on the misrepresentation claim (No. 87-5655), while SCO cross-appeals from the jury's verdict on the breach of contract claim (No. 87-5595).

I.

The first issue we address is whether the District Court erred in finding for SCO on the plaintiff's claim under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982), which provides that "*[n]o otherwise qualified handicapped individual* in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the

participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." *Id.* (emphasis added). The plaintiff argues that he is an "otherwise qualified handicapped individual," and that the District Court erred in finding that the plaintiff's proficiency with the four instruments was necessary to graduate. He argues that SCO used the tests as a pretext for discrimination, contending that SCO applied a higher standard to him by requiring mechanical proficiency with the instruments. SCO tested other students, he claims, based only on knowledge, and not on mechanical proficiency.

The elements of a cause of action under section 504 are as follows: (1) The plaintiff is a "handicapped person" under the Act; (2) The plaintiff is "otherwise qualified" for participation in the program; (3) The plaintiff is being excluded from participation in, being denied the benefits of, or being subjected to discrimination under the program solely by reason of his handicap; and (4) The relevant program or activity is receiving Federal financial assistance. *See Pushkin v. Regents of Univ. of Colorado*, 658 F.2d 1372, 1384 (10th Cir. 1981); *Doe v. New York Univ.*, 666 F.2d 761, 774-75 (2nd Cir. 1981). *See also Southeastern Community College v. Davis*, 442 U.S. 397, 405 (1979). Despite agreement on the elements of a cause of action under section 504, the Courts of Appeals have been unable to agree on the proper allocation of burdens of proof in section 504 cases. *Compare Pushkin*, 658 F.2d at 1386-87 (defendant effectively bears burden of persuasion on "otherwise qualified" issue) *with Doe*, 666 F.2d at 776-77 (defendant bears only limited burden of production on "otherwise qualified" issue). *See also* Wegner, *The Antidiscrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect to Handicap under Section 504 of the Rehabilitation Act of 1973*, 69 Cornell L. Rev. 401, 481-91 (1984); Comment, *Section 504 of the Rehabilitation Act: Analyzing Employment Discrimination Claims*, 132 U. Pa. L. Rev. 876, 891-99 (1984). We decline to comment unnecessarily upon the propriety of burden shifting in

section 504 cases because the context of this case does not require us to reach the issue. Regardless of which party bears the ultimate burden of proof on the "otherwise qualified" issue, defendant here has satisfied that burden because it has established that the clinical proficiency requirements are a necessary part of the curriculum and plaintiff has admitted that he is unable to meet these requirements.

The District Court found that the plaintiff failed to establish that he was "otherwise qualified" for participation in the program. The District Court analyzed this element as requiring the plaintiff to show that he is able to meet all of a program's *necessary* requirements in spite of his handicap. *Davis*, 442 U.S. at 406-07. Plaintiff's neurological condition indisputably prevents him from being able to use the four instruments, thus the critical question is whether proficiency with the four instruments is a necessary requirement of the program. The District Court found that it was. The court noted that all of the expert witnesses who testified felt that the requirement was reasonable and desirable, and none said that it was not necessary. *Doherty*, 659 F. Supp. at 671. The plaintiff's argument that proficiency with the instruments was unnecessary was based on proof that the requirement was imposed only a year or so before the plaintiff failed to meet it; that many optometrists do not use these four instruments in their practice; that the instruments are not used in the general clinic at SCO; and that optometrists cannot legally use the instruments in the six states that do not permit optometrists to use diagnostic drugs. Such facts, the District Court found, do not render SCO's requirement unnecessary:

> SCO's requirement that its students demonstrate clinical proficiency on the four instruments in question is a necessary one. Although these instruments were not typically used by optometrists ten years ago, their use is becoming much more common as states allow optometrists to use diagnostic drugs. Ability to use the instruments pro-

> perly is essential to avoid injury to the patient. As an educational institution, SCO may set standards for its program that insure a particular level of competence in particular areas. Section 504 does not require that SCO lower or substantially change those standards to accommodate an individual whose handicap prevents him from meeting them.

Id. at 671 (citing *Davis*, 442 U.S. at 413). The plaintiff has failed to show that the District Court's finding, that the requirement is necessary, is clearly erroneous. *See Anderson v. Bessemer City*, 470 U.S. 564, 573-76 (1985).

Plaintiff argues that *Davis* and its progeny require the court to find that the program cannot reasonably accommodate the plaintiff's handicap before the court may find that the plaintiff is not "otherwise qualified." The District Court held that the reasonable accommodation question is separate from the question of whether the plaintiff is otherwise qualified, and addressed instead the defendant's actions with respect to accommodating an individual who is otherwise qualified. *Doherty*, 659 F. Supp. at 673. The District Court went on to find, however, that either analysis yielded the same result because SCO's refusal to waive the requirement did not demonstrate a failure to reasonably accommodate the plaintiff.

In *Hall v. United States Postal Service*, No. 86-2082, slip op. at 9 (6th Cir. Aug. 23, 1988) we held that the inquiry into reasonable accommodation is one aspect of the "otherwise qualified" analysis under section 504. Although the assertion in *Davis*, 442 U.S. at 413, that "[s]ection 504 imposes no requirement upon an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person" still holds true, subsequent cases have forced this court to reevaluate the unequivocal observation in *Davis* that "[a]n otherwise qualified person is one who is able to meet *all* of a program's requirements in spite of his handicap." *Davis,* 442 U.S. at 406 (emphasis added). As the Fifth Circuit

stated in *Brennan v. Stewart*, 834 F.2d 1248, 1261-62 (5th Cir. 1988):

> After *Alexander* [v. Choate, 469 U.S. 287 (1985),] it is clear that the phrase 'otherwise qualified' has a paradoxical quality; on the one hand, it refers to a person who has the abilities or characteristics sought by the grantee; but on the other, it cannot refer only to those already capable of meeting *all* the requirements — or else no reasonable requirement could ever violate § 504, no matter how easy it would be to accommodate handicapped individuals who cannot fulfill it. This means that we can no longer take literally the assertion of *Davis* that 'an otherwise qualified person is one who is able to meet *all* of a program's requirements in spite of his handicap.' 4[4]2 U.S. at 406, 99 S.Ct. at 2367 (emphasis added). The question after *Alexander* is the rather mushy one of whether some 'reasonable accommodation' is available to satisfy the legitimate interests of both the grantee and the handicapped person. And since it is part of the 'otherwise qualified' inquiry, our precedent requires that the 'reasonable accommodation' question be decided as an issue of fact — meaning, of course, that it is one for the trial court or jury, subject to 'clearly erroneous' . . . review only.

See also School Bd. of Nassau County v. Arline, 480 U.S. 273, 287-88, n.17 (1987) ("[w]hen a handicapped person is not able to perform the essential functions of the job, the court must also consider whether any 'reasonable accommodation' by the employer would enable the handicapped person to perform those functions").

While the District Court erred in treating the reasonable accommodation question as separate from the otherwise qualified analysis, the District Court was not clearly erroneous in its determination that SCO's refusal to waive the clinical proficiency requirement was not a failure to reasonably accommodate the plaintiff. Although SCO had a limited obligation to make

reasonable accommodations for handicapped individuals such as plaintiff, it is clear that "[n]othing in the language or history of § 504 reflects an intention to limit the freedom of an educational institution to require reasonable physical qualifications for admission to a clinical training program." *Davis*, 442 U.S. at 414. An educational institution is not required to accommodate a handicapped individual by eliminating a course requirement which is reasonably necessary to proper use of the degree conferred at the end of a course of study. *See Hall*, slip op. at 10. Waiver of a necessary requirement would have been a substantial rather than merely a reasonable accommodation. *Doherty*, 659 F. Supp. at 673 ("[s]urely the law does not require that a handicapped person be accommodated by waiver of a requirement when his failure to meet the requirement poses potential danger to the public"). *Cf. Copeland v. Philadelphia Police Dep't*, 840 F.2d 1139, 1148-49 (3rd Cir. 1988).

Here, too, the District Court's finding, that SCO did not fail to make a reasonable accommodation, is not clearly erroneous. SCO's elimination of the clinical proficiency requirement would not have been a reasonable accommodation. Accordingly, we affirm the District Court's dismissal of plaintiff's section 504 claim.

II

The plaintiff also argues that the District Court erred in directing a verdict in favor of SCO on the plaintiff's state law misrepresentation claim. The nature of SCO's alleged misrepresentations is not entirely clear. Apparently, the plaintiff argues that Drs. Ebbers and Vasa misrepresented to Ms. Dale "plaintiff's physical ability to perform in optometry school and his employment opportunities after school." The law in Tennessee is clear, however, that an opinion cannot be the basis for a claim of misrepresentation, which requires that the defendant misrepresent a *fact*. *See, e.g., Edwards v. Travelers Ins.*, 563 F.2d 105, 110 (6th Cir. 1977); *McElroy v.*

Boise Cascade Corp., 632 S.W.2d 127, 130 (Tenn. App. 1982); *Brungard v. Caprice Records, Inc.*, 608 S.W.2d 585, 590 (Tenn. App. 1980).[1] The plaintiff argues that a well-settled exception exists to the rule that opinions cannot be the basis for a claim of misrepresentation, when the opinion is made by someone who holds himself or herself out as having special expertise or special knowledge relating to the subject matter of the misrepresentation, citing the Restatement (Second) of Torts § 542(a). However, the plaintiff fails to cite any Tennessee law that supports his argument. We generally defer to an experienced district judge's construction of state law, especially when as here that judge served as a state trial judge before appointment to the federal bench. *See Louisville and Jefferson County v. Travelers Ins. Co.*, 753 F.2d 533, 540 (6th Cir. 1985) (quoting *Rudd-Melikian, Inc. v. Merritt*, 282 F.2d 924, 929 (6th Cir. 1960)); *Clairol, Inc. v. Boston Discount Ctr. of Berkley, Inc.*, 608 F.2d 1114, 1120 n.8 (6th Cir. 1979). We, therefore, affirm the trial judge's permissible conclusion that a directed verdict should be granted as to plaintiff's misrepresentation claim.

III

In its appeal from the jury's verdict for the plaintiff on his breach of contract claim, SCO argues first that no contract existed between the parties. Second, if a contract existed, it included SCO's right to make reasonable and necessary changes to the curiculum, and thus SCO did not breach the contract by adding the clinical proficiency requirement. Third, no proof in the record existed that SCO exercised bad faith in making curriculum changes. Fourth, damages were not proven with specificity and, because of the proof, were necessarily speculative. Last, SCO argues that no proximate causal connection was proven between the alleged breach and the alleged damages. The second and third arguments are persuasive.

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[1] Furthermore, Dr. Ebbers' opinion, by its terms, was limited solely to the plaintiff's visual limitations, and did not address his neurological limitations.

SCO argues that the catalog of requirements did not create a contract, express or implied, between SCO and the plaintiff, given the language on the inside front cover of the 1978-79 catalog stating that: "this catalog should not be construed as constituting a contract between the College and any person." The plaintiff argues, however, that the relationship between a student and university is contractual in nature, and that not only do the catalogs, bulletins, circulars and regulations of the university form an express contract, but than an implied contract exists between a university and its students requiring the university to act in good faith in dealing with its students. The plaintiff argues that SCO acted in bad faith in refusing to waive the clinical proficiency requirement for plaintiff.

A

Before we examine plaintiff's contractual theories under state law, we note that this case arises in an academic context where judicial intervention in any form should be undertaken only with the greatest reluctance. *See, e.g., Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 226 (1985) (declaring federal courts unsuited "to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions"). The federal judiciary is ill equipped to evaluate the proper emphasis and content of a school's curriculum. *Board of Curators of Univ. of Missouri v. Horowitz*, 435 U.S. 78, 89-91 (1978). This is the case especially regarding degree requirements in the health care field when the conferral of a degree places the school's imprimatur upon the student as qualified to pursue his chosen profession. *See Jansen v. Emory Univ.*, 440 F. Supp. 1060, 1062-63 (N.D. Ga. 1977), *affd*, 579 F.2d 45 (5th Cir. 1978); *Olsson v. Board of Higher Educ.*, 49 N.Y.2d 408, 413, 402 N.E.2d 1150, 1153, 426 N.Y.S.2d 248, 251 (1980) ("In order for society . . . to have complete confidence in the credentials dispensed by academic institutions . . . the issuance of these credentials [must] be left to the sound judgment of the professional educators"). This

judicial deference to educators in their curriculum decisions is no less applicable in a clinical setting because evaluation in a clinical course "is no less an 'academic' judgment because it involves observation of . . . skills and techniques in actual conditions of practice, rather than assigning a grade to . . . written answers on an essay question." *Horowitz*, 435 U.S. at 95 (Powell, J., concurring) (footnote omitted). Against this backdrop we examine plaintiff's state law contract claims.

Since plaintiff asserts a state contract law claim, Tennessee law governs this issue. The parties, however, cite little Tennessee law defining the relationship between the university and the student. Plaintiff relies on *Bales v. Lincoln Memorial University*, slip op. (Tenn. Ct. App. Dec. 31, 1980),[2] for the proposition that the student-university relationship is contractual in nature although courts have rejected a rigid application of contract law in this area. *See, e.g., Corso v. Creighton Univ.*, 731 F.2d 529, 531 (8th Cir. 1984); *Lyons v. Salve Regina College*, 565 F.2d 200, 202 (1st Cir. 1977), *cert. denied*, 435 U.S. 971 (1978); *Mahavongsanan v. Hall*, 529 F.2d 448, 450 (5th Cir. 1976); *Slaughter v. Brigham Young Univ.*, 514 P.2d 622, 626 (10th Cir.), *cert. denied*, 423 U.S. 898 (1975). We are inclined to agree. Although the relationship may be analyzed as a contractual one, courts have adopted different standards of review when educators' decisions are based upon disciplinary versus academic criteria — applying a more intrusive analysis of the former and a far more deferential examination of the latter. *See, e.g., Mahavongsanan*, 529 F.2d at 449-50. The Tennessee Supreme Court has endorsed this deferential standard of review for decisions by universities based upon academic criteria. *See Horne v. Cox*, 551 S.W.2d 690, 692 (Tenn. 1977) (" '[w]e know of no case which holds that colleges and universities are subject

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[2] We will assume for purposes of this appeal that the *Bales* case has precedential value. *But see Swift v. Kirby*, 737 S.W.2d 271, 277 (Tenn. 1987).

to the supervision or review of the courts in the uniform application of their academic standards' " (quoting *Mahavongsanan*, 529 F.2d at 449-50)).

The Tennessee Supreme Court has not, as far as we are able to determine, enunciated the standard which should be applied in a dispute arising out of the university-student relationship. In light of *Horne*, we believe that the Tennessee Supreme Court, in construing the terms of an implied contract between the university and the student, would adopt the deferential standard of "reasonable expectation — what meaning the party making the manifestation, the university, should reasonably expect the other party to give it.' " *Lyons*, 565 F.2d at 202 (quoting *Giles v. Howard Univ.*, 428 F. Supp. 603, 605 (D. D.C. 1977)). Furthermore, we are of the opinion that implicit in the university's general "contract" with its students is a right to change the university's academic degree requirements if such changes are not arbitrary or capricious. *Mahavongsanan*, 529 F.2d at 450; *Nuttelman v. Case Western Reserve Univ.*, 560 F. Supp. 1, 3 (N.D. Ohio 1981), *aff'd*, 708 F.2d 726 (6th Cir. 1982); *Jansen*, 440 F.Supp. at 1062-63; *accord Bales*, slip op. at 5 ("this Court does not intend to dictate or interfere with the formation and implementation of a private university's academic policies"). We now turn to plaintiff's three closely related contract claims.

B

For purposes of our analysis we divide plaintiff's contractual claims, which are not very clearly focused, into three types: First, an implied contract between plaintiff and SCO containing terms in common with all other students based on the SCO 1978-79 catalog; second, an implied contract unique to the plaintiff himself and SCO based on the representations of Drs. Ebbers and Vasa in conjunction with the SCO catalog; and, third, an implied contract of good faith and fair dealing.

In view of the disclaimer language on the inside front cover of the catalog, it is difficult to find, as plaintiff asserts, that a bind-

ing contract was created promising the SCO class entering in 1978 the right to graduate determined under the standards in the 1978-79 catalog. The plaintiff relies on *Bales*. In that case the appellant, who had a perfect 4.0 grade point average and led his class, learned two days prior to graduation that the administration would require a student to complete a minimum of 92 credit hours at the school before he could graduate with any type of honors. This requirement was first announced to the student body at the appellant's graduation rehearsal, one day prior to the ceremony. The appellant had only 91 credit hours; the school admitted that if not for the minimum hours requirement the appellant would have graduated magna cum laude and as valedictorian. The appellant sued, alleging that the catalog under which he enrolled contractually established the exclusive criteria for graduation honors, and that no minimum hours were set out in the catalog as a requirement. The catalog specifically provided that all school policies were subject to change. Witnesses testified that the policy of requiring a certain number of credit hours had always been unwritten.

The *Bales* court found that:

> Lincoln Memorial University's 1976-78 student catalog, which makes no mention of any minimum residence hours credit requirement for honors graduation, upon enrollment formed a contract with the student upon which he was entitled to rely . . . . Although, as previously noted, the academic policies are expressly stated to be subject to change, the provisions of a contract cannot be modified *after one side has completed performance or without giving the student a reasonable time for compliance after receipt of notification of that intended change in policy.* Mr. Bales did not receive notice of any minimum residence hours credit requirement for honors, including the original unwritten policy of 96 hours, until two days prior to his commencement ceremony, at which time he was unable to take any steps to comply with the requirement because he had completed all his courses.

Slip op. at 4 (emphasis added). Thus according to *Bales,* a contractual relationship exists between the student and the institution with respect to requirements for graduation even though the institution retains the right to change the requirements. This reservation, of the right to make changes in the terms of the contract, was subject to reasonable notice. The case at bar stands in sharp contrast to *Bales* in that the plaintiff had ample notice of the change of requirements; plaintiff does not argue that SCO failed to provide him with reasonable notice.

Applying the "reasonable expectation" standard set out in Part III A above, we believe it was reasonable for SCO, given the disclaimer printed in the front of its handbook and the practice of prospective application of curriculum changes, to expect the students to anticipate and comply with curriculum changes affecting their remaining years at the school. SCO's modification of the degree requirement to include a clinical proficiency in the four instruments was reasonable. The District Court noted even palintiff's witnesses all stated that the requirement was in fact reasonable and desirable. *Doherty*, 659 F. Supp. at 671. No record evidence exists that SCO acted arbitrarily, capriciously or with malice. SCO simply fulfilled its educational mission by updating its degree requirments as dictated by the expanding demands of the field of optometry. *See Mahavongsanan*, 529 F.2d at 450 ("[Plaintiff's] claim of a binding, absolute unchangeable contract is particularly anomalous in the context of . . . post graduate level work"). Thus, this Court should not substitute its judgment for that of the educators involved.

Plaintiff's second contractual argument is that a special contract, express or implied, existed between SCO and himself that he would be able to successfully complete the program based on the requirements as they stood in the 78-79 catalog and the evaluations of Drs. Ebbers and Vasa. Assuming, *arguendo*, that some form of implied contract could be created based upon Dr. Ebbers' assertions coupled with the 78-79 catalog, if plain-

tiff is to prevail SCO would have had to impliedly agree that plaintiff would complete the program in spite of his handicap *and*, necessarily, that SCO would make no changes or additions to the program (no matter how necessary) if the effect of such changes would be to prevent plaintiff's receipt of his degree. SCO did not expressly agree to such a contract. Nor would it be reasonable for someone in plaintiff's position to so believe. Dr. Ebbers' report to Ms. Dale did not state that plaintiff *would* graduate but merely opines that his *visual* problems are not so acute as to *prohibit* him from studying at SCO. Furthermore, plaintiff himself admitted at trial that he held no belief that the college undertook to guarantee his graduation. Plaintiff's assertions that SCO impliedly agreed not to change its curriculum if the effect would be to prevent his graduation or that SCO by examining him impliedly guaranteed his ability to graduate are unfounded.

Finally, plaintiff indirectly asserts that SCO acted in bad faith by adopting these requirements and/or by refusing to waive them upon request by plaintiff. As previously stated, all of plaintiff's witnesses stated that the new requirement was reasonable and desirable. Furthermore, no evidence was introduced nor does plaintiff himself maintain that SCO deliberately introduced the new clinical proficiency requirement to prevent plaintiff's graduation. Lastly, SCO fulfilled its obligation to act in good faith when it provided plaintiff daily assistance in practicing with the instruments for one whole quarter. *See Olsson*, 49 N.Y.2d at 414, 402 N.E.2d at 1153, 426 N.Y.S.2d at 251. Plaintiff's claim of lack of good faith is based upon SCO's refusal to award plaintiff his diploma in spite of his inability to pass the new requirements. This action by SCO is not an action taken in bad faith — it is simply the university exercising its right to make a necessary change in its curriculum in light of the changing practice of optometry.

Plaintiff failed to show a breach of contract by SCO. SCO's motion for a directed verdict should have been granted as to

plaintiff's contract claim. Because we reach this result based on plaintiff's failure to prove the cause of action, we do not address defendant's other arguments.

For the forgoing reasons, we affirm the judgment of the District Court denying plaintiff's section 504 claim and directing a verdict in favor of defendant on plaintiff's misrepresentation claim. We, however, set aside the judgment in favor of plaintiff on his state contract claim, and reverse and remand that aspect of the case with instructions for the District Court to enter judgment for the defendant.

JONES, Circuit Judge, concurring in part, dissenting in part. While I concur in the result reached by the majority concerning Doherty's misrepresentation and handicap discrimination claims, I respectfully dissent from the majority's reversal of the jury verdict in favor of Doherty on his contract claim.

My dissent flows from the majority's conclusion that the district court erred in failing to direct a verdict in favor of Southern as to Doherty's breach of contract claim. Under Tennessee law, which we are required to apply to this state law claim, "[a] directed verdict should not be granted if there is *any* material evidence in the record that would support a verdict for the plaintiff . . . ." *Dewberry v. Maddox*, 755 S.W.2d 50, 55 (Tenn. App. 1988) (emphasis added). *See also Wharton Transport Co. v. Bridges*, 606 S.W.2d 521, 525-26 (Tenn. 1980). Moreover, under Tennessee law, where the student possesses a reasonable belief that a college will not change its degree requirements as to him, and where the college should reasonably have expected the student to form such a belief, the student may maintain an action for breach of contract if the degree requirements are changed to his detriment. *See Bales v. Lincoln Memorial University*, slip op. (Tenn. App., Dec. 31, 1980). *Cf. Peretti v. State of Montana,* 464 F. Supp. 784, 786 (D.Mont. 1979), *rev'd on other grounds*, 661 F.2d 756 (9th Cir. 1981) (stating that the university/student relationship is contractual in

nature and that "[o]nly that which is reasonable may be implied" as a term of the contract).

In my view, the statements which Drs. Ebbers and Vasa made concerning Doherty's ability to complete the optometry program at Southern constitute material evidence from which a jury reasonably could find that a contract existed between Doherty and Southern, and that Southern breached that contract. Since Drs. Ebbers and Vasa repeatedly indicated that Doherty's handicap would not prevent him from completing the optometry program, the jury could reasonably have found (1) that Doherty had a reasonable belief that no clinical proficiency requirements would be applied to him, and (2) that Southern should reasonably have expected Doherty to form such a belief. Since there existed sufficient evidence under Tennessee law to find in favor of Doherty on his contract claim, I respectfully dissent from the majority's reversal of the jury's verdict.

APPENDIX B

OPINION OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. 82-2881 GA

James Paul Doherty,
Plaintiff,

vs.

Southern College of Optometry,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW
(Filed April 28, 1987)

In this action plaintiff James Paul Doherty originally asserted claims against several defendants under Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, under 42 U.S.C. § 1983 and under state law. The § 1983 claim was dismissed prior to trial. In a single trial the state law claims were tried before a jury, and the handicap discrimination claim was tried before the court. The jury returned a verdict of $225,000 for plaintiff on the state law claim. The court now makes the following findings of fact and conclusions of law with respect to the handicap discrimination claim, in which Southern College of Optometry is the only defendant.

I. FINDINGS OF FACT

A. **Plaintiff's Personal Background and Handicap.**

Plaintiff, who was 36 years old at the time of trial, has retinitis pigmentosa. Retinitis pigmentosa is an eye disease that results in the loss of peripheral vision and also causes a loss of sight in reduced light. Thus, in layman's language retinitis pigmentosa results in tunnel vision and night blindness. Plaintiff's visual fields are restricted to a minimal field of 6° in his right eye and 10° in his left eye.

Plaintiff also suffers from an undiagnosed neurological condition associated with his retinitis pigmentosa. A 1967 evaluation of plaintiff by the Clinical Center of the National Institute of Health revealed that plaintiff suffers from a "neurologic disease manifest by peripheral sensory neuropathy, minimal motor abnormalities and cerebellar signs." Plaintiff's neurological condition affects his motor skills as well as his sense of touch and his manual coordination. He has more difficulty than the average person in using dials and also has difficulty in walking due to the neurological condition and his visual limitations. The neuromuscular problem prevents plaintiff from feeling pressure, pain or vibration in his fingertips.

Although plaintiff had originally planned to be an optometrist, as his father and grandfather had been, he did not pursue an optometry career after high school due to his visual and neurological problems. Instead, plaintiff enrolled as a student at the University of Mississippi. He received a B.A.E. degree in social studies in 1971 and an M.S.S. degree in history in 1972, both from that school. Plaintiff then taught in a private school. After leaving the school plaintiff had difficulty finding suitable employment.

B. **Plaintiff's Application and Enrollment at Southern College of Optometry.**

Southern College of Optometry (SCO) is a not-for-profit institution that received federal financial assistance in the form of grants between 1977 and 1982. The federal funds were used in a variety of programs, including the clinical program.

In 1975 plaintiff first sought admission to SCO. He was placed on stand-by status. In 1976 plaintiff applied again with the same result.

On January 5, 1977, prior to his third admission application, plaintiff was examined by SCO faculty members Drs. Robert W. Ebbers, Denson Smith and Vasa at SCO's clinic. This examination was conducted at the request of Phyllis Dale, a counselor for the Rehabilitation for the Blind Division of the Tennessee Department of Human Services who was working with plaintiff. The express purpose of the examination was to ascertain whether plaintiff was able to perform the requirements of the optometry program and, what, if any, employment opportunities would be available to plaintiff after graduation. The examination lasted for several hours. During the course of the examination plaintiff told Ebbers and others at the SCO Clinic that he was planning to attend SCO. Although the examination was for the purpose of assessing vision problems, Ebbers testified that during this examination he had an opportunity to observe plaintiff's movements.

Plaintiff's medical and health records for the prior ten years were made available to the clinic personnel at SCO in January 1977. In particular, the 1967 report of the National Institute of Health was provided to Ebbers. The report sets out in detail plaintiff's neurological and visual problems. Ebbers testified that he read this report thoroughly. Further, the SCO clinic staff was aware of retinitis pigmentosa and "all of its implications."

After examining plaintiff and reviewing plaintiff's medical records, Ebbers wrote to Phyllis Dale on January 12, 1977, advising that plaintiff's "ability to overcome his field constriction by eye movements, combined with his academic record, and his motivation, all indicate that visually he should be able to handle any academic endeavor he attempts." Moreover, Ebbers stated, "[t]he stability of his condition should persist and should not interfere with completion of his studies or continuation of his chosen profession."

About this same time plaintiff was given a general physical examination by Dr. Nicholas Gotten, Jr. On January 13, 1977, Gotten wrote to Phyllis Dale indicating that plaintiff has an "undiagnosed neurological condition, stable." Gotten further stated that plaintiff was unsuited for certain vocations that required coordination and sensory input. Gotten doubted that plaintiff could be an optometrist, but felt he should be allowed to try. This letter was not furnished to SCO.

On February 1, 1977, Phyllis Dale met with Ebbers and Vasa to discuss SCO's evaluation of plaintiff for a vocation in the field of optometry. Both doctors indicated to her that at first they had been pessimistic about plaintiff's ability to succeed in optometry. They told her, however, that after examining him and reviewing the medical records, they believed that plaintiff's condition appeared stable, that the possibilities for plaintiff in optometry were promising, and that plaintiff should be able to practice optometry without restriction. Moreover, Ebbers and Vasa advised Dale that even if plaintiff's condition should deteriorate, he would still have employment opportunities in teaching, supervising others in training, or in operating an optometric business. Based on the assurances and statements of Ebbers and Vasa, Dale recommended that the Rehabilitation for the Blind Division of the Department of Human Services support plaintiff in optometry school.[1]

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[1] The State of Tennessee provided tuition support and reader services for plaintiff while he was a student at SCO.

On November 28, 1977, with Dale's assistance, plaintiff sought admission for the third time to the four-year optometry program at SCO. Plaintiff's application stated on line 10: "Physical Handicaps: Retinitis pigmentosa."

Plaintiff was accepted into the O.D. program at SCO for the academic year beginning in the fall of 1978. Subsequent to his acceptance a Dr. James W. Day completed a physical examination form for plaintiff which was submitted to SCO. The form did not indicate plaintiff's handicaps.[2]

Plaintiff entered SCO in the fall of 1978, and successfully completed more than three years of the four year O.D. program. At the end of the summer quarter in 1981, which was the beginning of his final year at SCO, plaintiff was a senior in good standing, with a grade point of 2.41 of a possible 4.00. He had completed the same course of study as others in his class at that time and had done so without any special accomodations by SCO.

During this three year period, plaintiff participated in volunteer clinical projects sponsored by the Lions Clubs in Guatamala, Costa Rica and Belize, examined and worked with patients, and performed successfully in the SCO clinic. Dr. Thomas Stander, a classmate of plaintiff, testified that he had traveled to Central America with plaintiff on four occasions, that plaintiff actively participated in patient care, and that on one trip he and plaintiff took charge of the trip.

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[2] In this court's judgment, the facts relating to plaintiff's admission to SCO and SCO's pre-admission knowledge of his handicap are not relevant to the handicap discrimination claim. These facts were extremely important with respect to plaintiff's state law claim, however. Because plaintiff argues that they are also relevant to the handicap discrimination claim, this court includes factual findings on these subjects here.

C. Plaintiff's Failure to Pass Clinical Proficiency Requirements.

During plaintiff's second year at SCO, in response to changes in state laws permitting optometrists to use diagnostic drugs to diagnose eye pathology, the school changed its graduation requirements to make its existing externship program mandatory for all students. In addition, it added clinical proficiency requirements which had to be satisfied prior to entering the mandatory externship program, including a requirement that students demonstrate proficiency on various instruments used in the pathology clinic. The externship and clinical proficiency requirements were made applicable to all students enrolled at that time.[3]

In the spring of 1981, plaintiff experienced difficulty using certain instruments in the pathology clinic. Dr. Denson Smith, Chief of the Pathology Clinic, was advised of plaintiff's difficulties in May 1981. Smith observed plaintiff in the pathology clinic and concluded in July 1981 that it would be hazardous for plaintiff to perform any techniques in the pathology clinic that would involve physical contact with patients. Smith was of the opinion that plaintiff did not have the necessary "eye sight" or the "coordination and sensitivity in his fingers" to perform with the instruments in the pathology clinic. After this point Smith prohibited plaintiff from touching patients in the pathology clinic and restricted plaintiff's activities to taking

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[3] Joyce Bell Kay, a former admissions officer at SCO, testified that, as a general rule, a student would be required to complete the requirements of the catalog under which he or she had entered. Ms. Kay noted particularly that when the O.D. program was changed from a 3 to 4 year program, students already in school were allowed to graduate under the 3 year program. Dr. Vonne Porter, SCO Executive Vice President, testified, however, that certain curriculum changes were made in 1968-69 and 1975-76 which were, like the clinical proficiency requirements, applied retroactively to students in school at the time of the change. Thus, it appears that some changes were applied retroactively while others were not.

case history and evaluating data. Plaintiff was permitted to continue working with patients in SCO's other specialty clinics, including the contact lens clinic.

On September 11, 1981, Dr. John Levene, SCO Dean of Faculty, wrote to SCO President Spurgeon B. Eure, stating: "In view of his tremendous handicaps, [plaintiff] is to be commended for the tremendous effort that he has put out and what he has achieved so far academically. . . . He obviously must realize that he can never practice optometry as a "normal" clinical practitioner." Levene proposed awarding plaintiff an honorary degree.[4]

As of October 31, 1981, sixty-three percent of plaintiff's class had taken and passed the pathology clinic proficiency examination.

On November 3, 1981, Levene wrote to the then Assistant Director of Clinical Programs, Dr. Wylie Tirey, stating:

> I cannot help feeling that in view of Dr. Smith's comments and memoranda referring to St. Dr. Doherty's handicaps leading to poor performance, that you should request the student to have his competency examination at the earliest opportunity. I can see nothing to be gained by prolonging it.

On November 4, 1981, Tirey sent a memorandum to plaintiff which stated:

> Dr. Smith and the other members of the Pathology Clinic Staff have reported to me that they feel that because of your lack of fine motor control and your visual problems that you will be unable to pass the Pathology Clinic's Competency Test.

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[4] Levene later wrote to Eure retracting the recommendation that plaintiff be offered an honorary degree.

> Since passage of this competency test is a requirement for participation in our externship program and since participation in an approved externship is a requirement for graduation, I feel that it would be in everyone's best interest for you to take the Pathology Clinic's Competency Test as soon as possible.
>
> Please contact Dr. Smith within the next week to set up a time for taking this test.

Plaintiff received this memorandum some time after November 4 and met with Smith on November 10. At the meeting plaintiff asked Smith for two weeks to practice for his pathology check-out, but Smith only gave him one week. The pathology check-out was scheduled for November 18, 1981.

On November 18, 1981, Smith administered to plaintiff what was scheduled to be the required check-out on all pathology procedures. During the pathology check-out plaintiff successfully performed on two instruments. When plaintiff attempted to perform with the Zeiss 4-mirror gonioscope, however, he put excessive force on the eyeball and was unable to perform with the instrument. Smith then terminated the check-out exam, determining that there was too great a risk of injury to the patient if plaintiff was allowed to proceed. Because he felt the use of the Goldmann 3-mirror gonioscope and the binocular indirect opthalmoscope was even more difficult, Smith saw no reason to permit plaintiff to attempt to check out on these instruments. Plaintiff was given a failing grade in the pathology clinic check-out examination.

Smith detailed the results of plaintiff's check-out exam in a memo dated November 18, 1981. He stated:

> My opinion today is the same as it was stated in my memo of July 2, 1981. He does not possess the fine muscle coordination and eyesight necessary to do the techniques successfully and with a reasonable amount of safety to a patient.

> In the future, he will be allowed only to observe and, as he must be graded as other students, will be given a grade of zero.

Plaintiff successfully passed all of the other clinic check-outs required for participating in the mandatory externship program, including vision training, electrodiagnostics, dispensing, contact lens, and general clinic. It is undisputed that plaintiff only lacked demonstration of mechanical proficiency on four instruments in pathology clinic and his externship to complete the requirements for graduation. These four instruments were the Zeiss 4-mirror gonioscope, the Goldmann 3-mirror gonioscope, the binocular indirect ophthalmoscope, and the Schiotz tonometer.

Plaintiff requested a waiver of the pathology clinic proficiency check-out requirements. This request was considered by the SCO Admissions and Examinations Committee and denied. The Admissions Committee did recommend that plaintiff be awarded an honorary degree.

Plaintiff sought further review of the Admissions Committee decision before the Executive Committee of the Board of Trustees and, ultimately, the Board of Trustees itself. Plaintiff's request for a waiver was denied at all levels, but the Board of Trustees decided in March 1982 that plaintiff should be given an additional quarter to practice with the pathology instruments in question and then be re-examined. Prior to this decision both Levene and Smith had stated that they felt there was no hope plaintiff could pass a retest. Plaintiff agreed to practice and attempt the pathology check-out a second time.

As a prerequisite to any practice by the plaintiff, SCO required any volunteer "patients" for plaintiff's practice sessions to sign a release. The release was intended to protect both SCO and the plaintiff. The release provided in part:

> It is my desire to have a necessary optometric examination at the Southern College of Optometry.

> I understand that the person to perform such examination has a possible deficiency of fine muscle coordination and appropriate eyesight, but he is otherwise qualified as an optometric student.
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> . . . .

Plaintiff practiced the various pathology procedures diligently during the spring quarter of 1982. He was assisted in his practice by SCO faculty member Dr. James Burke. On June 2, 1982, plaintiff was given a second pathology check-out exam. This exam was conducted by three SCO professors: Burke, Dr. Fred R. Burnett and Dr. Jim M. Newman, III. Levene was also present. At plaintiff's request Smith was not a part of the check-out committee.

On June 3, 1982, Eure wrote to plaintiff advising him that he had failed the second pathology check-out and that, since he would be unable to complete the degree requirements, his enrollment in the Doctor of Optometry Program was terminated.

The procedure used for plaintiff's check-out differed from that utilized for other students. Students were required to pass the clinical check-outs before beginning their mandatory externships. They generally could select the instructor with whom they wanted to check out and the time for the check-out. They could test on one instrument at a time or on a block of instruments. If a student failed a particular instrument, retesting was allowed. Some students were passed without actually performing on all instruments.

Plaintiff's externship was scheduled for the spring of 1982; thus he was tested on the instruments prior to the time scheduled for his externship.

Plaintiff testified that he was humiliated by the process utilized by SCO preceding his termination and that he was depressed

by the school's decision. This testimony was corroborated by plaintiff's brother, Bill Doherty.

Shortly after plaintiff's termination from the O.D. program, on June 16, 1982, Levene replied to a memo from Eure detailing plaintiff's assertions that he had been treated unfairly. Levene's reply included the following:

> Not only does James Doherty have severe handicaps (blindness and poor neuromotor control, etc.) but in genuinely believing that he is equal to the average student in his class he has a vivid imagination exhibiting wishful thinking, that perhaps too borders on the pathological.

Plaintiff concedes that because of his visual and neurological handicaps he is unable to pass an examination on the four instruments in question. Plaintiff has all technical knowledge necessary for use of the instruments; his only deficiency in using them results from his inability to manipulate them properly. Because of his handicaps, plaintiff is unable to determine how much pressure he is exerting on the eyeball. Thus, he cannot use the instruments without danger to the patient.

D. Uses of the Four Instruments and Basis for the Proficiency Requirement.

The four instruments with which plaintiff was unable to demonstrate mechanical proficiency are used to evaluate the pathology of the human eye. Each routinely requires the use of diagnostic drugs.

The Zeiss 4-mirror, the Goldmann 3-mirror and the Shiotz tonometer are all diagnostic instruments used by placing them directly upon the cornea of the patient. They are used in conjunction with a slit lamp to examine the inner portions of the eye for potential symptoms of glaucoma, torn retinas, holes in retinas, and other problems. Too much pressure exerted by the optometrist on the patient's cornea with these instruments can cause corneal injury and misdiagnosis. The indirect binocular

opthalmoscope is used in low lighting for the purpose of examining in three dimensions the interior aspects of the patient's eyes for retinal tears and other eye pathology.

Much expert testimony was presented about the extent to which these instruments are used by private practitioners and the necessity for an academic requirement of proficiency in them.

The proof established that in the past ten years there have been considerable changes in state laws relating to use of diagnostic drugs by optometrists. Ten years ago approximately three to five states allowed optometrists to use such diagnostic drugs; at the time of trial forty-three states allowed diagnostic drugs to be used by optometrists, and three other states allowed use of therapeutic drugs. Because the four instruments in issue require use of diagnostic drugs, they were not generally taught in optometry schools ten years ago.

The four instruments on which plaintiff could not demonstrate proficiency are extremely valuable tools in the diagnosis of eye pathology. While some of plaintiff's witnesses who are optometrists asserted that they did not use the instruments or that they used them with varying degrees of regularity, all plaintiff's witnesses admitted the importance of the instruments as diagnostic tools in determining eye pathology. All plaintiff's witnesses asserted that the demonstration of proficiency in the use of such instruments as an academic requirement was in fact reasonable and desireable. Defendants' witnesses, Drs. Larry Alexander[5] and Spurgeon Eure, both Doctors of Optometry and both involved in the optometric academic process, went further and specifically asserted that the demonstration in proficiency in the use of the instruments involved was essential to the program of instruction in a school of

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[5] Dr. Alexander is professor of optometry at the University of Alabama at Birmingham School of Optometry.

optometry. Dr. Alexander stated that the use of such instruments was "the standard of care" for present-day practicing optometrists and a necessary part of a general optometry exam.

Ebbers, who was on the Admissions Committee which heard plaintiff's appeal, testified that he voted against a waiver of the requirements because they were important and necessary.

Despite the proof that the requirement of proficiency in the four instruments is reasonable or essential, there is considerable proof that many optometrists do not use them regularly in their practices or know how to use them.

Plaintiff's expert Dr. John Mohr, who has been in the general practice of optometry in Mississippi for over twenty years, testified that he does not use any of these four instruments and they are seldom used by optometrists in Mississippi. He feels the Schiotz tonometer is obsolete and inaccurate and the indirect opthalmoscope is unnecessary in the general practice or optometry. He does not use either the 4-mirror or 3-mirror gonioscope as their primary purpose is the further evaluation of glaucoma, which he cannot treat under Mississippi law. He believes that an optometrist can practice to the acceptable level medical standards without the use of any of these instruments.

Another of plaintiff's witnesses, Dr. Raymond John Homer, a former professor at SCO and one of plaintiff's former instructors in the general clinic, testified that he has not used these instruments in his practice of optometry in Texas. In Texas optometrists cannot use diagnostic drugs and, therefore, the use of these instruments by a practicing optometrist is illegal. Dr. Homer further testified that these instruments were used primarily by "ophthalmologists or some type of eye or retinal specialist, other than a general practicing optometrist."

Dr. Steve Thomas, a classmate of plaintiff who now practices optometry in Colorado, testified that these four instruments play a "minimal role" in his practice of optometry, that these

instruments are not used in routine patient care and are only used with patients who require additional evaluation of potential pathology problems. Dr. Tom Stander, another classmate of plaintiff who now practices optometry in Arizona, testified that he has used the Zeiss 4-mirror three or four times since his graduation from optometry school, that he has never used the Goldmann 3-mirror and that he has only used the Schiotz tonometer on trips to Central America. He does use the indirect opthalmoscope because he treats a population with high diabetes potential. Stander testified that an optometrist can practice without the use of any of these instruments.

Ebbers testified on cross-examination that an optometrist could structure a practice without the use of these instruments and that, for example, in the low vision clinic he directs at SCO, low vision practice is maintained by relying upon pathology evaluations from the pathology clinic of SCO. Smith testified that an optometrist "can practice without using these instruments but that he or she would have to have someone else to do these things."

The four instruments are not used in the general eye exam at SCO or in the general clinic. Levene admitted in his deposition that all faculty members at SCO were not proficient in pathology.

Several witnesses who knew plaintiff testified that he could practice optometry successfully without use of the instruments. Plaintiff indicated that he intended to limit his practice to work in low vision and that he will not use the instruments in question but will refer out all patients suspected of eye pathology.

Witnesses for both plaintiff and defendant agree that eye pathology cannot always be determined from a history or from an examination that does not include the use of the four instruments as diagnostic tools. In addition, failure to use these instruments can result in the overlooking of eye pathology that can lead to permanent injury and even blindness. Further, the

use of diagnostic drugs without first checking the "angle" with the Zeiss 4-mirror can precipitate closed angle glaucoma, which leads to blindness. Further, there was proof that an important element of low vision practice is to determine the eye pathology that causes patients' low vision.

E. **Accommodation by Other Educational Institutions.**

Plaintiff presented testimony from Donna Sparger, director of handicap services at Memphis State University. Sparger testified that Memphis State waives certain degree requirements on a case by case basis as is necessary to accommodate handicap students, considering the nature of the handicap and the necessity of the requirement for the degree being sought. She gave examples of waiving a foreign language requirement for hearing impaired students and of waiving certain laboratory requirements. Finally she testified that she was aware of Dr. David Hartman, a well-known blind physician.

The evidence presented by Sparger has virtually no probative value in this case. Evidence of another educational institution's policies in situations dissimilar to the instant one contributes little to a determination of whether SCO violated the handicap discrimination law in refusing to waive the clinical proficiency requirement.

II. CONCLUSIONS OF LAW AND LEGAL ANALYSIS

As both parties concede, the court has jurisdiction of this case under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794.

Section 504 provides in pertinent part:

> No otherwise qualified handicapped individual in the United States, as defined in Section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be sub-

> jected to discrimination under any program of activity receiving federal financial assistance. . . .

29 U.S.C. § 794 (Supp. 1985).

The courts have adopted rules concerning order and allocation of proof for handicap discrimination cases. In order to establish a *prima facie* case, plaintiff must prove that 1) he is an "otherwise qualified" handicapped person; 2) he has been excluded from participation in, denied the benefits of or discriminated against under the program solely by reason of his handicap; and 3) the relevant program or activity receives federal financial assistance. *See Southeastern Community College v. Davis,* 442 U.S. 397 (1979); *Doe v. New York University,* 666 F.2d 761, 774-75 (2d Cir. 1981); *Pushkin v. Regents of University of Colorado,* 658 F.2d 1372, 1384 (10th Cir. 1981). Once plaintiff has established a *prima facie* case, defendant has the burden of producing evidence that plaintiff was not an otherwise handicapped individual or that his termination from the program was for reasons other than his handicap. *Pushkin,* 658 F.2d at 1386-87. Plaintiff retains the ultimate burden of proof in the case and must prove by a preponderance of the evidence that defendant's reasons for its action are based on misconceptions or unfounded factual conclusions and that the reasons encompass unjustified consideration of the handicap. *Id.*

The parties agree that SCO is a "program or activity receiving federal financial assistance" under Section 504 and is thus subject to the requirements of that provision. Further, plaintiff is clearly a handicapped individual under the Act. *See* Section 706(7)(B) of the Act, 29 U.S.C. § 706(7)(B).

Initially therefore the court must consider whether plaintiff has established that he is an otherwise qualified individual. The United States Supreme Court provided guidance for making this determination in *Davis,* 442 U.S. at 406-07. In *Davis* the court gave a simple definition of an otherwise qualified person:

> An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap. *Id.* at 406.

In the instant case plaintiff plainly does not fall within the *Davis* definition. By his own admission, he is unable to meet the clinical proficiency requirements of SCO's program. Thus, despite his knowledge of the instruments in question, he is not an otherwise qualified individual.

The inquiry does not end at this point, however. In *Davis* the court faced a claim arising out of a community college's refusal to admit an applicant with a serious hearing disability to its nursing program. After concluding that the district court had correctly construed the statute in finding that the applicant was not otherwise qualified, the court proceeded to consider whether the college's physical requirements for its nursing program were necessary. *Id.* at 407. *Cf.* 34 C.F.R. § 104.3(K)(3) (explanatory note using term "essential" rather than necessary). Thus, requirements must be necessary in order to be a proper basis for rendering a person not otherwise qualified within the meaning of the statute.

Davis' disability interfered substantially with her ability to understand speech and she could not have participated in the program's clinical aspects without close individual supervision. *Davis*, 442 U.S. at 409-10. Thus, her participation in the program would have represented a fundamental alteration in the training normally provided by the program. *Id.* at 410. In discussing whether the statute imposed on the college an obligation to make such a modification, the court said:

> In this case, however, it is clear that Southeastern's unwillingness to make major adjustments in its nursing program does not constitute such discrimination. The uncontroverted testimony of several members of Southeastern's staff and faculty established that the purpose of its program was to train persons who could serve the nursing pro-

> fession in all customary ways. This type of purpose, far from reflecting any animus against handicapped individuals is shared by many if not most of the institutions that train persons to render professional services. It is undisputed that respondent could not participate in Southeastern's nursing program unless the standards were substantially lowered. *Section 504 imposes no requirement upon an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person.* (footnote omitted) (emphasis added) *Id.* at 413.

The court recognized, however, that ". . . *situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory.*" *Id.* at 412-13. (emphasis added)

In view of *Davis*, the issue before this court is whether SCO's clinical proficiency check-out requirement is a necessary one — one which the educational institution has no obligation to modify substantially to accommodate plaintiff.

There was no disagreement among the expert witnesses about the reasonableness or desirability of a proficiency requirement for the four instruments in question. All felt such a requirement was reasonable and desirable. No expert said the requirement was not a necessary one; defendant's experts said that it was necessary. Plaintiff's argument that the requirement was not a necessary one is therefore not based on expert opinion that the requirement is not necessary. Rather, it is based on factual proof that established the following: 1) the requirement was imposed only a year or so before plaintiff failed to meet it; 2) many optometrists do not use these four instruments in their practices; 3) technicians can use the instruments, thus potentially alleviating the need for an optometrist to use them; 4) the instruments are not used in the general clinic at SCO; and 5) optometrists cannot legally use the instruments in six states that do not permit optometrists to use diagnostic drugs.

Defendant's response that the requirement is necessary relies upon the expert opinion proof. Further, defendant points out that the diploma of an educational institution repesents to the world that its recipient has a particular degree of skill and knowledge and does not pose a danger to the public. Defendant argues that plaintiff's inability to use the instruments without danger to patients is a further factor demonstrating the necessity of the requirement.

SCO's requirement that its students demonstrate clinical proficiency on the four instruments in question is a necessary one. Although these instruments were not typically used by optometrists ten years ago, their use is becoming much more common as states allow optometrists to use diagnostic drugs. Ability to use the instruments properly is essential to avoid injury to the patient. As an educational institution, SCO may set standards for its program that insure a particular level of competence in particular areas. Section 504 does not require that SCO lower or substantially change those standards to accommodate an individual whose handicap prevents him from meeting them. *Id.* at 413.

Plaintiff's argument that many optometrists do not use the instruments in their practices skirts the real issue. SCO may properly seek to insure that its graduates can perform without danger to the public in any professional role they choose. *See id.* at 413 n.12. Plaintiff's intention or ability to structure a practice that does not require use of the instruments is thus of little probative value with respect to the necessity of the requirement. Training in any professional field requires mastery of a variety of subject matter areas the professional may not use later. The focus must be on the basis for the requirement, not whether it is conceivable to work as an optometrist without meeting it.

Nor does the fact that the requirement was recently adopted undermine the court's finding of its necessity. Necessity must be evaluated at the time the requirement was applied to plain-

tiff. Given the rapidly changing situation in optometry with respect to use of diagnostic drugs, the recent adoption of the requirement did not render it unnecessary.

In arguing that the requirement was not necessary, plaintiff focuses on the language in *Davis*, 442 U.S. at 412-13, indicating that refusal to modify a program may be unreasonable or discriminatory in some circumstances. The same facts that make the requirement unnecessary, plaintiff contends, make the refusal to waive it unreasonable and discriminatory. This argument is without merit. Because SCO legitimately determined that proficiency on the four instruments was an important and necessary skill for its graduates and because plaintiff cannot use the instruments without danger to patients, it was not unreasonable or discriminatory to refuse to waive the requirements. Plaintiff contends that one factor to be considered in evaluating the reasonableness of SCO's refusal to waive its requirement is SCO's knowledge of plaintiff's handicap before plaintiff enrolled. The court disagrees. While SCO's prior knowledge of plaintiff's handicap was relevant with respect to the breach of contract claim, it is irrelevant to the instant inquiry. The reasonableness inquiry with respect to the handicap discrimination claim relates solely to the nature of the requirement, not to the particular circumstances of SCO's dealings with plaintiff.

Underlying the principal legal issue in this case is a fundamental difference between the parties as to the proper interpretation of the *Davis* case. Adopting plaintiff's view of *Davis* would involve the courts in evaluating the necessity of legitimate academic requirements of educational institutions by ascertaining whether or not a student could function in the career field for which he was prepared without using the information or skill gained in meeting a particular requirement. If a student could function in his chosen career field without having met it, the requirement would, in plaintiff's view, be unnecessary. This court interprets *Davis* differently. *Davis* affirms the principle

that educational institutions do not have to lower academic requirements to accommodate handicapped persons. Its language concerning situations in which refusal to modify a program may be "unreasonable and discriminatory" speaks to situations in which a requirement has no necessary relation to the particular area in question. For example, refusal to alter a physical education requirement for a history degree would clearly be "unreasonable and discriminatory." A refusal to modify a requirement clearly related to patient safety and diagnosis of eye pathology in the practice of optometry is not unreasonable or discriminatory. A contrary holding would completely nullify *Davis*' plain statement that "Section 504 imposes no requirement on an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person." *Id.* at 413.

The parties disagree about the applicable law and the proper interpretation of *Davis* in another respect. The *Davis* holding was later discussed by the United States Supreme Court in *Alexander v. Choate*, 105 S.Ct. 712 (1985). Although *Choate* is important principally for its discussion of disparate impact handicap discrimination claims, the Court in *Choate* also assessed its analysis in *Davis*, the other major Supreme Court case interpreting Section 504. The court in *Choate* said:

> *Davis* thus struck a balance between the statutory rights of the handicapped to be integrated into society and the legitimate interests of federal grantees in preserving the integrity of their programs: while a grantee need not be required to make "fundamental" or "substantial" modifications to accommodate the handicapped, it may be required to make "reasonable" ones.
>
> The balance struck in *Davis* requires that an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers. The benefit itself, of course, cannot be defined in a way

> that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled; to assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made. (citations and footnotes omitted). 105 S.Ct. at 720-21.

Choate arguably characterizes the issue of whether an educational institution must modify a requirement to accommodate a handicapped individual as a "reasonable accommodation" issue — an issue separate from, but related to the determination of whether an individual is "otherwise qualified." Plaintiff apparently adopts this interpretation of *Choate* and in essence urges the court to analyze SCO's refusal to waive its requirement in terms of whether or not waiver was a reasonable accommodation of plaintiff's handicap. Defendant's position is that the two issues should not be confused and that plaintiff has not established a *prima facie* case that he is an "otherwise qualified" handicapped person. In any event, defendant contends, reasonable accommodation was made in providing plaintiff an opportunity to practice and take the check-out test again; waiver was not required to make reasonable accommodation.

This court does not read *Choate* as undermining the simple statement in *Davis* that "an otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." The reasonable accommodation inquiry is a separate issue — one which involves evaluation of a defendant's action with respect to accommodating an individual who is otherwise qualified. *See Jasany*, 755 F.2d at 1250-51. In the context of this case, however, application of the analysis urged by either party yields the same result. SCO was not unreasonable or discriminatory in refusing to waive a necessary requirement of its program. *See Davis*, 442 U.S. at 412-13. Nor was the refusal to waive the requirement a failure to make a reasonable accommodation; the modification resulting from the waiver would have been substantial or fundamental rather than

reasonable.[6] *See Choate*, 105 S.Ct. at 720. Surely the law does not require that a handicapped person be accommodated by waiver of a requirement when his failure to meet that requirement poses potential danger to the public.

Because plaintiff is not an otherwise qualified handicapped person and because defendant did not fail to make a reasonable

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[6] Plaintiff contends that defendant bears the burden of proving that reasonable accommodation is not possible. Defendant disagrees. The issue has not been explicitly decided in the Sixth Circuit in a case involving a recipient of federal financial assistance. In *Jasany,* however, which involved a federal agency defendant, the Sixth Circuit followed the burden of proof standard with respect to reasonable accommodation set forth in *Prewitt v. United States Postal Service*, 662 F.2d 292, 308 (5th Cir. 1981). *Prewitt* places the burden of persuasion on this issue on the employer. *Prewitt* also involved a federal agency defendant and the decision was based on an EEOC regulation that would not be applicable to SCO as a recipient of federal financial assistance. Assuming that the burden of proof rests with defendant on this issue, however, defendant has carried that burden.

modification in its program, plaintiff's claim must fail.[7] Plaintiff has not established a *prima facie* case or carried his ultimate burden of proof. Judgment shall be entered for defendant on the handicap discrimination claim.

IT IS SO ORDERED.

/s/ Julia Smith Gibbons
United States District Judge

Date: April 28, 1987

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[7] Plaintiff has established that he was treated differently from other students in the testing process because of his handicap. Arguably he also seeks damages allegedly caused by this different treatment. *See* Plaintiff's Proposed Findings of Fact and Conclusions of Law at 44 ("plaintiff was, because of his handicap, singled out . . . for disparite (sic) treatment that destroyed plaintiff's likelihood of success in completing the program.") This different treatment in the testing process does not provide plaintiff an alternate avenue of recovery, however. The proof plainly establishes that the testing procedure had absolutely no effect on plaintiff's ability to pass the test; he concedes that he cannot pass the check-out because of his handicap and there is no claim that he could have passed if he had practiced longer or under different circumstances. Thus, the procedure caused no damage to plaintiff except perhaps mental anguish. That mental anguish cannot be a basis for recovery by plaintiff. Plaintiff's mental suffering came from his failure, the appeal process, the re-test, the circumstances of his practicing and the release required of "patients." While certainly this was not a pleasant process for plaintiff, the procedure was a legitimate and justified response by SCO to the situation? Certain memoranda of SCO officials, particularly Levene, are extremely insensitive. Plaintiff, however, was not aware of these memos while he was going through the testing procedure. They cannot be the basis of a mental anguish claim.